2011 WL 694928 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

Charles P. DEEDS, Plaintiff/Appellant,
v.
WADDELL & REED INVESTMENT MANAGEMENT COMPANY, Defendant/Appellee.

No. 10-104949-A.
January 24, 2011.

Appeal from the District Court of Johnson County, Kansas Honorable
Thomas Sutherland, Judge District Court Case No. 09 CV 3116

Brief of Appellant

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Oral Argument Requested: 20 Minutes.

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1** ***NATURE OF THE CASE

This is a case concerning unpaid commissions and the wrongful discharge of an employee for seeking payment of those commissions. Chuck Deeds was employed by Waddell & Reed as a sales representative, selling investment services to institutional investors, from 1998 to 2007. Deeds was by far the most productive salesperson in the department, and his commission compensation soared. So in mid-2005 Waddell & Reed changed its commission plan, and applied the new, reduced-commission plan not only to new accounts sold, but also to scheduled commission payments for sales Deeds had already made.

Deeds believed the retroactive application of the new commission plan to reduce his commissions on prior sales was wrong and a breach of the parties' compensation agreement. On several occasions he complained about the breach to upper management, which strung him along for over a year. Finally, after the issue was brought to the attention of Waddell & Reed's CEO, Deeds was fired. Management explained that it decided not to respond to Deeds' compensation complaint and knew he would not be happy about it. (R. Vol. I, 57, 66).

Waddell & Reed then took the position that Deeds was not entitled to either the "old account" commissions he had complained about, or scheduled commissions on the "new accounts" he had sold after the commission plan was changed. The reason given to Deeds was that he was no longer employed, and continued employment was a condition of payment. This alleged condition was not part of either the old or new commission plan or otherwise communicated to Deeds.

Deeds' first and second causes of action are tort claims based on his firing. First, Deeds alleges that Waddell & Reed discharged him in retaliation for exercising his rights ***2** under the Kansas Wage Payment Act, K.S.A. 44-313, et seq. ("KWPA"). Second, Deeds alleges, in the alternative, that Waddell & Reed wrongfully discharged him to try to avoid paying him commissions for work he had already performed.

Deeds' third and fourth causes of action, which he pleads in the alternative, are contract-related and quasi-contract claims directed toward recovery of compensation owed to him for sales work he had already performed prior to his discharge. Deeds' third cause of action is a prevention claim. Waddell & Reed cannot legitimately escape paying commissions to Deeds for the work he already performed by deliberately preventing him from performing the alleged conditions after Deeds had already done all the work to make the sale. Finally, as his fourth cause of action, Deeds alleges in the alternative that if he cannot recover in this action under the doctrine of prevention, at minimum he is entitled to payment for the reasonable value of the services he provided to Waddell & Reed pursuant to the equitable doctrine of quantum meruit.

The third and fourth claims are in the alternative to the pending administrative claim Deeds filed with the Kansas Department of Labor ("KDOL") aimed at recovering the commissions he believes are owed to him under the KWPA. Deeds maintains in that action that he is entitled to commissions for the work he performed before he was discharged, namely the selling of accounts. Waddell & Reed argues, however, that Deeds did not earn these commissions because continued employment and ongoing account servicing were conditions precedent to earning these commissions. Deeds disputes that the parties' commission agreements included such conditions. Deeds' third and fourth causes of action in the instant civil case are in the alternative to the pending KWPA action in the sense that each provides a civil remedy even if one accepts Waddell & Reeds' position that continued employment was a condition precedent to receiving ***3** commissions. In other words, Deeds may prevail on these claims even if he loses his KWPA claim.

The district court entered summary judgment against Deeds on August 2, 2010. (R. Vol. I, 281-304). While acknowledging there were disputes of material fact on the retaliatory and wrongful discharge claims, the court dismissed these claims as unrecognized by Kansas law. In the district court's words: "[a]though the Kansas appellate courts appear to be gradually carving out public policy exceptions to the employment-at-will doctrine, *this* Court declines to accept plaintiff's invitation to create a new one." (R. Vol. I, 291 (emphasis in original)). The district court also rejected Deeds' prevention and unjust enrichment claims because Deeds was an at-will employee, subject to termination for any reason, and the underlying termination was not illegal.

Deeds appeals the entire summary judgment order. The employment-at-will doctrine is not a license to break one's word, steal, or retaliate against an employee who exercises rights under the KWPA.

ISSUES

A. There is a strong and longtime Kansas public policy of protecting wages and wage earners. This policy is a principal objective of the KWPA. Does this strong and longtime public policy support a claim for retaliatory discharge where an employer fires an employee for complaining to upper management seeking payment of wages he understood were owed him?

B. Does the strong and longtime public policy of protecting wages and wage earners support a claim for wrongful discharge where an employer fires an at-will employee to try to avoid paying wages that would otherwise be owed?

***4** C. Under the doctrine of prevention, a party who has demanded a condition precedent cannot hinder, delay, or prevent its happening for the purpose of avoiding the performance of the contract. Does an at-will employee state a claim for prevention where the employee has performed all, or substantially all, of the work required to earn the wages, and the employer terminates the employee to try to avoid paying the wages?

D. Deeds procured large accounts under a pay plan whereby commissions for a sale are paid over time. Waddell & Reed fired him and refused to pay commissions, contending that Kansas law is powerless to prevent "an employer from terminating an employee to gain access to that employee's accounts or commissions." (R. Vol. II, 327). Is Waddell & Reed correct, or does equity prevent such unjust enrichment?

FACTS

Procedural Posture Of The Case.

This appeal arises from an order entering summary judgment. (R. Vol. I, 281-304). Waddell & Reed's motion for summary judgment is found at R. Vol. II, 310-11, and the supporting brief is at R. Vol. II, 312-31, with supporting exhibits following. Deeds' response brief is at R. Vol. I, 49-83, followed by supporting exhibits. Waddell & Reed's reply brief is at R. Vol. I, 209-28. Because this is an appeal of a summary judgment order, the below facts are stated in the light most favorable to Deeds. Significant factual determinations by the trial court are set forth where appropriate.

Identity Of The Defendant-Appellee.

Deeds brought this action against three interrelated entities, (1) Waddell & Reed Financial, Inc.; (2) Waddell & Reed Investment Management Company; and (3) Waddell & Reed, Inc. (R. Vol. I, 5). By stipulation in May 2010, Deeds dropped his claims ***5** against the first and third defendants, leaving only Waddell & Reed Investment Management Company as a defendant.

Waddell & Reed Recruits And Hires Deeds.

Waddell & Reed Investment Management Co. ("Waddell & Reed") is a Kansas corporation. It is a member of a family of companies affiliated with Waddell & Reed Financial, Inc., an NYSE-traded public corporation, one of the oldest mutual fund complexes in the United States. (R. Vol. I, 6, 16-17).

Deeds has worked in the securities business since graduating from college in 1984. (R. Vol. I, 63). Over time his work focused on marketing and sales to institutional clients. *(Id.)*.

In 1998, Waddell & Reed Senior VP James McCroy lured Deeds from Colorado to Kansas to work for Waddell & Reed. (R. Vol. I, 63). McCroy wanted Deeds to help Waddell & Reed grow its Institutional Marketing Department, which had been stagnant for several years. *(Id.)*, Deeds began his employment with Waddell & Reed in the Spring of 1998. (R. Vol. I, 51).

Waddell & Reed Enters Into A Compensation Agreement With Deeds.

McCroy initially told Deeds that he would be paid a base salary of $85,000, plus commissions on his sales. (R. Vol. I, 52). But before Deeds started, McCroy sent him an offer letter stating that he would receive a base salary of $77,000, plus he would have the "opportunity to receive additional compensation, which will be based on your sales production and your ongoing client servicing." (R. Vol. I, 51, 63, 191). The letter did not describe the terms and conditions by which Deeds would receive such "additional compensation" for either sales production work or ongoing client servicing work. (R. Vol. I, 191).

***6** When Deeds reported to work, McCroy explained Deeds' compensation scheme in more detail. McCroy said he could not give Deeds a base salary higher than $77,000, because that was what another sales representative was being paid. (R. Vol. I, 52). So to compensate for a base salary lower than the one promised, McCroy gave Deeds a few existing accounts for him to service, for which he would receive additional compensation. (R. Vol. I, 52). (Service of those pre-existing accounts is the source for the reference in McCroy's letter to "ongoing client servicing." (R. Vol. I, 52)). McCroy further explained that in addition to the (1)base salary and (2) client servicing income, Deeds would also receive (3) compensation in the form of commissions for new accounts he gained, based on the following terms: 20% of the fees Waddell & Reed generated on the account in year one; 10% in year two; 5% in year three; 5% in year four; and then 2.5% per year for "as long as that account remained at Waddell and Reed." (R. Vol. I, 51-52, 63, 89, 91, 96, 120; R. Vol. II, 314). The parties' commission agreement did not say anything at all about ongoing client servicing or continued employment being a condition to receive the agreed sales commissions under the schedule; the only stated condition was that the account had to remain at Waddell & Reed. (R. Vol. I, 63, 89-91, 96).

The parties had a contract regarding Deeds' commissions. Under this agreement, Deeds provided services--namely, selling and closing accounts--and in exchange Waddell & Reed was obligated to pay him the promised commissions for gaining that business. (R. Vol. I, 52-53). Based on the parties' agreement, Deeds understood he earned his entire commission upon gaining a new account, although payment would be spread out over time, and payment was subject to the account remaining at Waddell & Reed. (R. Vol. 1, 52-53, 63-64, 91). Consistent with Deeds' understanding that ongoing ***7** client servicing was not a condition of payment, Deeds was in fact paid commissions on accounts he gained for Waddell & Reed but never serviced. (R. Vol. I, 52-53).

Waddell & Reed asserts the ongoing trail commissions were payable to Deeds only so long as *he* remained at Waddell & Reed. (R. Vol. II, 314). Deeds controverted this contention and provided evidence he would receive the ongoing trailers as long as *the account* remained with Waddell & Reed. (R. Vol. I, 52-53, 63). The district court found that Deeds established a dispute of fact whether he was required to remain with Waddell & Reed to earn the ongoing trail commissions. (R. Vol. I, 282, 284).

Waddell & Reed Imposes A Cap On Commissions.

In 1999, Waddell & Reed informed Deeds for the first time about a $50,000 cap on the commission it would pay on any account in a given year. (R. Vol. I, 64). Caps were atypical in the industry. *(Id.)*. In fact, 22 of 24 firms in a market study utilized by

Waddell & Reed did not have any caps. And the two that did have caps imposed limits of $250,000 per account pear year--five times greater than Waddell & Reed's cap. *(Id.)*. The revelation of a commission cap, a year into his employment, was shocking to Deeds, who had never heard of such a cap before. *(Id.)*. Deeds projected that the cap could curtail his commissions by up to $400,000.00 to $1,000,000.00 for that year alone. (*Id.*, 64, 90-91 (describing right to eight sales that would have resulted in $100,000.00 to $150,000.00 in first-year commissions if uncapped, but would now be capped at $50,000.00 per year each)). Deeds expressed his concern about the cap to McCroy. (*Id.*, 64). McCroy apologized for not telling Deeds about the cap, and told Deeds that in the long-run he would make a lot of money under Waddell & Reed's back-loaded commission scheme, specifically promising that Deeds would continue to receive trail commissions on each account he sold for "as long as [the] account remained at Waddell ***8** & Reed." (*Id*, 64, 91). Again, McCroy did not say that continued employment or client servicing was a condition of payment. (*Id.*, 91).

Waddell & Reed Changes Deeds' Commission Structure And Phases Out Scheduled Commission Payments On Sales He Had Already Made.

In 2004, John Sundeen assumed oversight responsibility of the Institutional Marketing Department. (R. Vol. I, 64). Around July 1, 2005, Sundeen changed the commission structure. Under the new plan, sales commissions for new accounts sold would now be made over a three-year period. But Waddell & Reed applied the new plan not only to sales made after July 1, 2005, but also to previous sales Deeds had already made, so as to phase out and eventually eliminate the scheduled commissions for those prior sales. (*Id;* R. Vol. II, 315-16, 378-80 (authenticated memorandum)). To summarize, for new accounts gained after July 1, 2005, there would only be three years' worth of commissions, with no fourth-year or trail commissions; and for existing accounts the fourth-year and trail commissions scheduled to be paid out would be reduced over two years and eventually eliminated. (R. Vol. I, 53-54; Vol. II, 378-80).

Deeds Complains To Upper Management About The Retroactive Application Of The New Commission Plan to Phase Out Scheduled Commission Payments For Sales He Had Already Made.

Deeds recognized that Waddell & Reed had the right to change the commission structure on the new accounts he gained after the change was announced. (R. Vol. I, 53, 54-55, 64). But, Deeds believed (and still believes) Waddell & Reed could not apply the new commission structure retroactively to reduce scheduled commission payments on sales he had already made. (R. Vol. I, 64). Deeds believed he and Waddell & Reed had a contractual arrangement that he would sell new accounts, and in exchange Waddell & ***9** Reed would pay him ongoing sales commissions, per the stated schedule, for making the sale, just like Waddell & Reed had promised. (R. Vol. I, 64, 120).

Deeds complained about the phase out of his commissions to his immediate supervisor, Nikki Newton, and also to Newton's supervisor, John Sundeen. (R. Vol. II, 316-17; R. Vol. I, 55-56, 64-65). Deeds first raised his concerns with management shortly after the commission structure change was announced, and he discussed the issue again with management in late 2005, Spring 2006, and Fall 2006. (R. Vol. I, 65). Deeds continued to meet with management about the matter because they would not give him a final answer or response, but kept saying they would look into it, and then never got back to him. (R. Vol. I, 65). During these meetings, Deeds complained to management that he and the company had an agreement regarding payment of commissions on accounts he had gained, that Waddell & Reed had broken the agreement by applying the new schedule to existing accounts he had already sold, and that it was "wrong to break the agreement" in this way. (R. Vol. I, 55-56, 64-65, 92, 99, 116, 119).

Still having not received a response to his complaint about the phase out of his commissions for sales previously made, Deeds met with Newton again to discuss this issue during the first week of January, 2007. (R. Vol. I, 65). During this meeting, Deeds again complained about the elimination of trail commissions for prior sales. *(Id.)*. Newton told Deeds he was discussing the matter with Hank Herrmann, the CEO, and would get back with him. *(Id.)*.

Waddell & Reed Fires Deeds.

Newton finally got back with Deeds, as promised, on April 9, 2007. On that day Newton called Deeds into his office and said, “Chuck, I've taken your compensation complaint to management. They have determined not to respond. They know because ***10** they're--they--they have determined because you will not be happy to their response, that we will--we are going to terminate your employment today.” (R. Vol. I, 57, 117). Deeds specifically asked Newton if he was being fired for any other reason, including performance, and Newton answered, “no.” (R. Vol. I, 57, 117). Deeds' account of this meeting is supported by Sara Kircher, Waddell & Reed's Human Resources Representative, who was also present. She made the following notes: “Chuck walked into Nikki's office, saw me and said, ‘What's going on?’ Nikki said we've been talking for some months now about your compensation. I've discussed it w/ Hank and we're not going to make any changes. We know you aren't gong to be happy about this decision so we're terminating your employment.” (R. Vol. I, 66, 249).

Newton now claims Deeds was also fired for poor job performance, even citing poor performance as the first reason for the firing in the notes he made. (R. Vol. I, 66). Newton says Deeds was a bad employee in 2003, 2004, 2005, 2006, and 2007. *(Id.)*. Newton's contention that Deeds was a bad employee is inconsistent with the following facts: Deeds was consistently the most productive salesperson in the department, both in terms of accounts gained and assets under management; Newton's performance appraisal of Deeds in 2005 (the only one during this time period) was positive; in late 2006 Newton felt Deeds was valuable enough that he offered to try to get him a company car; on January 3, 2007, a few days before Deeds' final meeting with Newton to discuss his commission phase out, and before Newton had then discussed the matter with the CEO, Newton recommend a merit-based pay increase for Deeds, which Sundeen approved; and, of course, Newton's admission to Deeds that he was not fired for performance reasons. (R. Vol. I, 66-67).

***11** Waddell & Reed concedes, for summary judgment purposes, that it fired Deeds, “at least in part,” because he complained that the retroactive change for his commission schedule breached the parties' agreement. (R. Vol. I, 210, 220-21).

Waddell & Reed Refuses To Pay Deeds His Scheduled Commissions And Retains Them As A Windfall.

After Waddell & Reed fired Deeds on April 9, 2007, it refused to pay him any further commissions after first quarter 2007. Waddell & Reed refused to pay not only the long-disputed fourth-year and trail commissions for sales Deeds made before July 1, 2005 (over $1 million dollars in commissions at issue), but also the remaining scheduled commission payments under the new plan for sales Deeds made after July 1, 2005 (over $250,000 in commissions at issue). (R. Vol. II, 484).

Waddell & Reed did not pay out those commissions to any other salesperson. Instead, Waddell & Reed kept the unpaid commissions for itself as a windfall. **(R.** Vol. **I,** 69, 148).

Deeds Files A KDOL Action For Unpaid Wages.

Deeds filed a claim with the Kansas Department of Labor (“KDOL”) on April 4, 2008. (R. Vol. II, 484-88 (case styled *Charles P. Deeds, Claimant. v. Waddell & Reed Investment Management Company, Employer/Respondent*, Wage Claim No. 080307-1, OAH No. 09DL0060 CL (the “KDOL Action”))). (Deeds was not represented by counsel at the time he filed his KDOL Action and it was set for prehearing.) In the KDOL Action, Waddell & Reed took the position that Deeds' right to his scheduled commission payments was conditioned on his continued employment with the company. (R. Vol. II, 485). So, according to Waddell & Reed, by firing Deeds after he claimed he was owed certain disputed commissions, it effectively cut off any obligation to him for ***12** these commissions, in any event, because he failed to satisfy the condition of continued employment. *(See id.)*.

The Presiding Officer ruled against Deeds at the first administrative level. (R. Vol. II, 487). The Secretary of Labor granted Deeds' petition for review. The administrative claim is now fully briefed and argued and is pending a ruling by the Secretary of

Labor's Designee. Deeds acknowledges that a ruling in his favor in the KDOL Action could moot, at least in part, his prevention and unjust enrichment claims (third and fourth causes of action, respectively) in the present civil case, and/or that any damages awarded in the KDOL Action could offset any award under his prevention and unjust enrichment claims. However, because Deeds' prevention and unjust enrichment claims in this case are brought in the alternative to his administrative wage claims, a ruling for Waddell & Reed in the KDOL Action is not dispositive of these civil claims.

Nikki Newton Purloins The Pictet Account.

In 2005 and 2006, Deeds spent a considerable amount of time gaining an account from Pictet & Cie, a Swiss bank. (R. Vol. I, 67, 159). Pictet became a Waddell & Reed client in June 2006, and it is the largest client Waddell & Reed has ever had. (R. Vol. I, 58, 67). Pictet initially funded $93 million with Waddell & Reed, but this amount grew to over $2 billion. (R. Vol. I, 68)

After Deeds was fired, Newton took over the Pictet account. (R. Vol. II, 317). Newton provided a sworn affidavit that says "At the conclusion of Mr. Deeds' employment, I did not know who in my department would assume responsibility for any of Deeds' accounts, including Pictet, the largest account in the department at the time." (R. Vol. II, 408, 317). But Newton admitted participating in the decision to assign Pictet to himself. (R. Vol. I, 57-59). According to Newton, he was the only one in his ***13** department capable of handling the Pictet account. (R. Vol. I, 68). That left Newton as the only person to whom the Pictet account could be assigned. (R. Vol. I, 68-69). As a result of Deeds' termination, Newton realized over $140,000.00 in sales commissions based on new contributions Pictet made to the account. (R. Vol. I, 69). This $140,000.00 would have gone to Deeds but for Newton firing him. *(Id.)*.

Deeds' Lawsuit Against Waddell & Reed.

Deeds filed this civil action on April 7, 2009. (R. Vol. I, 5). His first claim is retaliatory discharge. This claim is based upon Waddell & Reed's stated reason for Deeds' termination: because of his complaints about the retroactive pay cuts violating their pay agreement. Deeds alleges Kansas public policy prohibits such retaliation. The second claim is wrongful discharge. It is based upon the same public policy, but for a different reason. After Deeds' termination, Waddell & Reed came up with a new reason for Deeds' termination - his performance. This demonstrably false and pretextual reason, coupled with evidence that Waddell & Reed and Newton gained from Deeds' termination, suggest that Deeds was terminated to avoid paying him earned commissions and so Newton could appropriate for himself commissions on Deeds' accounts.

Deeds brought two additional claims against Waddell & Reed. The first is prevention: that a party cannot derive a benefit or escape liability as a result of its own failure to cause, or its interference with, the happening of a condition precedent. Deeds brought this claim in the alternative to his KWPA Action. That is, the prevention claim assumes Waddell & Reed prevails on its contention that continued employment *was* a condition precedent to Deeds' receipt of commissions, such that Deeds could not "earn" them after his termination. The prevention claim asserts Waddell & Reed waived that ***14** condition precedent by terminating Deeds in bad faith, so that Waddell & Reed must pay Deeds those commissions he would have received but for his termination.

The final claim, also alternative to the KWPA Action, is unjust enrichment. Based on what Deeds understood to be his agreement with Waddell & Reed, the parties' course of conduct, and representations by Waddell & Reed, Deeds reasonably believed he would be paid commissions for the life of accounts gained prior to July 1, 2005, and for the full three-year schedule for accounts gained on or after July 1, 2005. To the extent there were absent terms or a disagreement about Deeds' commissions, the law implies a promise by Waddell & Reed to pay Deeds the reasonable value of his services. Waddell & Reed's litigation positions confirm that such an equitable claim is appropriate: Waddell & Reed disputes the terms of Deeds' compensation agreement and specifically alleges (a) there was no enforceable contract in the first place, (b) there was no mutual assent, or meeting of the minds, for any such contract, and (c) Waddell & Reed did not cause Deeds' failure to satisfy any condition precedent. (R. Vol. I, 26-27).

Disposition Of Deeds' Claims By The District Court.

The district court entered summary against all claims on August 2, 2010. (R. Vol. I, 281-304). Though acknowledging there were disputes of material fact on the retaliatory and wrongful discharge claims, the court rejected those claims because it declined to recognize any Kansas public policy that prohibits employers from discharging employees in retaliation for exercising rights under the KWPA or for the purpose of trying to avoid their wage payment obligations under the KWPA. (R. Vol. I, 289-91, 293-94). The district court concluded that Deeds could not maintain his prevention and unjust enrichment claims because it was concerned this could result in circumvention of the employment-at-will rule. (R. Vol. I, 299-300,303).

***15 Appellate Jurisdiction.**

The court below filed its memorandum decision and journal entry of judgment on August 2, 2010. (R. Vol. I, 281). Deeds filed and served a timely notice of appeal on August 24, 2010. (R. Vol. I, 305). Jurisdiction exists over this appeal pursuant to K.S.A. 60-2101 (a) and 60-2102(a)(4).

ARGUMENTS AND AUTHORITIES

I. Kansas' Strong And Longtime Public Policy Of Protecting Wages And Wage Earners Protects Employees Against Retaliation When They Exercise Rights Under The KWPA.

The core issue in this case is purely legal: whether our state's public policy protecting wages and wage earners is sufficiently strong to support a KWPA retaliatory discharge claim. This is an issue of first impression. Kansas law allows at-will employees to bring retaliatory discharge claims in many contexts, including workers compensation, whistleblowing, Federal Employers Liability Act, reporting **elder abuse**, and unemployment. The policies underlying the KWPA are just as strong and support a retaliatory discharge claim. Before discussing these points in detail, we must consider the applicable standard of review.

A. Standard Of Review.

The standard for review on motions for summary judgment is *de novo*. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 261 Kan. 806, 820, 934 P.2d 65 (1997). Summary judgment is only appropriate when, resolving all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought, the court determines that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. *Nicholas v.* ***16** *Nicholas*, 277 Kan. 171, 176, 83 P.3d 214 (2004). On appeal of a summary judgment, the appellate court is to apply the same rules and if it is determined that reasonable minds could differ as to the conclusions drawn from the evidence, the judgment must be overturned. *Nicholas*, 277 Kan. at 177.

An appellate court's review of a trial court's conclusions of law is unlimited. *Board of Johnson County Comm'rs v. Grant*, 264 Kan. 58, 61, 954 P.2d 695 (1998). The appellate court is free to substitute its judgment for that of the trial court and can draw its own conclusion of the question presented. *Id*. Because the district court dismissed Deeds' retaliatory discharge claim on a point of law - namely, that it is not recognized under Kansas law - this Court has plenary review over the issue.

B. Reference To Where Issue Was Raised And Ruled Upon.

The court below denied Deeds' retaliatory discharge because, in. its view, the “policy arising out of the KWPA is not so defined and fixed as required by Kansas law to serve as an exemption to the employment-at-will doctrine.” (R. Vol. I, 289). R. Vol. I,

285-91 is the district court's full ruling on Deeds' retaliation claim. Waddell & Reed's arguments on this point are at R. Vol. II, 320-26 and R. Vol. I, 219-24. Deeds' arguments in support of his retaliation claim are at R. Vol. I, 70-76.

C. The Landmark Case *Murphy v. City Of Topeka* Adopted The Tort Of Retaliatory Discharge To Prevent Employers From Coercing Employees In The Free Exercise Of Their Rights Under The Workers Compensation Act.

In *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981), this Court was presented with the question whether an employer is entitled to fire an employee in retaliation for filing a worker's compensation claim. In 1981, few courts had ever ***17** addressed the issue. In a landmark ruling, this Court recognized retaliatory discharge as a viable tort claim.

The facts of *Murphy* are simple. The city terminated Murphy because he refused to withdraw his workmen's compensation claim, so Murphy sued the city and individual defendants for retaliatory discharge. The trial court ruled Murphy stated a valid claim, but it dismissed his suit for failure to comply with the notice of claim statute.

This court began by considering whether Murphy's claim sounded in contract or tort. Murphy's retaliation claim was ruled a tort, and the Court's reasoning is material to this case. It recognized that Murphy's "termination did not breach any contractual obligations, either express or implied, presently recognized because as an employee-at-will his employment could be terminated at any time, with or without cause." 6 Kan. App. 2d at 492-93. Instead, the claim implicated "a duty imposed by law based upon public policy preventing an employer from wrongfully discharging an employee in retaliation for filing a workmen's compensation claim." *Id*.

Next this Court turned to whether such a claim exists. 6 Kan. App. 2d at 495. "To so hold [the Court] must find that the discharge of an employee-at-will in retaliation for filing a claim under the Workmen's Compensation Act is a cause for which an action in tort may lie in Kansas." *Id*. The Court paid quick homage to the employment-at-will doctrine, and then discussed two retaliation cases from Indiana and Illinois. *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973); and *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978). In those cases, the Indiana Supreme Court and the Illinois Supreme Court, respectively, had recognized a tort claim for retaliatory discharge by employees terminated for filing a workers compensation claim.

***18** The employer in *Murphy* characterized those other cases as "a small band of renegade opinions." This Court found them persuasive, however, and ruled a tort claim for retaliatory discharge exists in Kansas. 6 Kan. App. 2d at 495-96. Failing to do so would allow employers to chill employees from using the workers compensation system. The Workmen's Compensation Act was designed to provide exclusive, efficient remedies and promote the welfare of the people in this state. *Id*. "To allow an employer to coerce employees in the free exercise of their rights under the act would substantially subvert the purpose of the act." 6 Kan. App. 2d at 496.

There is less clash between the tort of retaliatory discharge and the employment-at-will doctrine than at first blush appears. This may explain why the *Murphy* opinion contains so little discussion of the employment-at-will doctrine. Kansas has long been an employment-at-will state. *See Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976). Where parties fail to set an employment *duration*, none is presumed. Thus, under the employment-at-will doctrine, "[i]n the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party, and the employee states no cause of action for *breach of contract* by alleging that he has been discharged." 220 Kan. at 54 (emphasis added). Some employers have mistakenly understood the employment-at-will doctrine to mean more than this--they believed it was a shield from liability no matter the basis for termination. *Murphy* implicitly rejected that misguided view.

The clash, if any really exists, is limited because the employment-at-will doctrine deals with the *duration* of employment. An employer needs no good reason--or any reason at all--to terminate an at-will employee. It does not follow, however, that all reasons are therefore legal. Prohibiting certain reasons does not somehow create a ***19** definite term of employment or require an employer to have a good reason for termination. Indeed, if that were the case, then the employment-at-will doctrine was

abrogated long ago when the legislature adopted the Kansas Act Against Discrimination. K.S.A. 44-1001, et seq. Yet no court has held that prohibiting certain reasons for termination implied a term of employment.

This Court in *Murphy* observed that the Kansas legislature had twice considered adding a statutory anti-retaliation law but failed to so. 6 Kan. App. 2d at 496. That legislative inaction made no difference to the Court. First, the legislature did not positively banish retaliation claims under the workmen's compensation act. Second, there was no evidence why the legislature failed to adopt the proposed anti-retaliation provisions. "Simple evidence of legislative inaction rather than action cannot defeat the public policy considerations we find here controlling." *Id*.

Murphy was groundbreaking when decided, but history has vindicated it as the correct decision. A Westlaw search reveals at least 209 positive references. The tort of retaliatory discharge for filing a workers compensation claim has found wide acceptance across the nation. *See* Am. Jur. 2d Wrongful Discharge § 93. Most importantly, the Kansas Supreme Court has fully embraced the holding of *Murphy*. *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 815-16, 752 P.2d 645 (1988).

In the thirty years since *Murphy*, Kansas courts have followed its persuasive logic to protect other public policies in many contexts. We turn next to those cases.

D. Kansas Courts Have Expanded *Murphy* To Protect Employees Whose Terminations Thwart Many Other Public Policy Concerns.

As the Kansas Supreme Court has put it, *Murphy* "opened the way to judicial recognition of a variety of public policy considerations which could support actions for ***20** tortious retaliatory discharges." *Morriss v. Coleman Co., Inc.*, 241 Kan. 501, 511, 738 P.2d 841 (1987). These include whistleblowing illegal conduct, exercising rights under the Federal Employers Liability Act, reporting **elder abuse**, and filing an unemployment claim.

1. Whistleblowing - *Palmer v. Brown* (1988).

An employer may not legally fire an employee for the purpose of hiding the employer's illegal conduct. The seminal decision *Palmer v. Brown*, 242 Kan. 893, 752 P.2d 685 (1988) established a retaliatory discharge claim based upon whistleblowing: "[t]ermination of an employee in retaliation for the good faith reporting of a serious infraction of the law by a co-worker or an employer to either company management or law enforcement officers is an actionable tort." 242 Kan. 893, syl. par. 2.

Palmer, an experienced medical technician, discovered that physicians at her company were billing Medicaid for services never rendered. The employer knew she possessed this knowledge. Towards the end of her probationary period, the employer extended the probationary period. A representative of the employer interrogated Palmer about the employer's billing practices and asked for her assurance she would keep that information secret. When she refused to say she would not report those practices to authorities, he told her she could not be trusted and warned her she could jeopardize her permanent status by talking. About a week later, Palmer reported suspected Medicaid fraud to unspecified authorities. She was then fired for a serious deterioration in her work performance that had occurred in the past two weeks.

Palmer brought suit for retaliatory discharge based upon whistleblowing. The defendants moved to dismiss, arguing the only exception to Kansas' employment-at-will ***21** doctrine was for workers' compensation, not whistleblowing, and therefore plaintiff failed to state a claim under K.S.A. 60-212(b)(6).

On appeal, the Court rejected the argument that *Murphy* was limited to the workers' compensation context--a "variety of public policy considerations" may support a claim of retaliatory discharge. *Palmer*, 242 Kan. at 897 (*quoting Morriss v. Coleman Co.*, 241 Kan. 501, 511, 738 P.2d 841 (1987)).

Palmer noted that the development of common law by courts over time to protect the public welfare is justified and essential. "The common law as modified by constitutional and statutory law, *judicial decisions*, and the *conditions and wants of the people*, shall remain in force in aid of the General Statutes of this state." *Palmer*, 242 Kan. at 896-97 (emphasis in original; *quoting* K.S.A. 77-109).

The Kansas Supreme Court observed that "[b]efore courts are justified in declaring the existence of public policy, however, it should be so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt." *Palmer*, 242 Kan. at 897 (citations and internal quotations omitted). The Court discussed the public policies underlying Medicaid, the prohibition on fraud in connection with Medicaid, crime reporting, and witness tampering. Then the Court declared whistleblowing to be an actionable tort in the state of Kansas, and remanded for further proceedings. 242 Kan. at 900.

2. Whistleblowing - Other Cases.

Embracing the logic in *Palmer*, Kansas courts have since applied whistleblowing protection to other public policies. The following conduct undermines public policy and supports a whistleblowing action:

***22** • Violations of DOT regulations. *Moyer v. Allen Freight Lines, Inc.*, 20 Kan. App. 2d 203, 885 P.2d 391 (1994).

• OSHA workplace safety issues, because the federal administrative remedy for whistleblowing was insufficient. *Flenker v. Willamette Industries, Inc.*, 266 Kan. 198, 967 P.2d 295 (1998).

• Illegal waste of groundwater. *Shaw v. Sw. Kan. Groundwater Mgmt. Dist. Three*, 42 Kan. App. 2d 994, 219 P.3d 857 (2009).

• Illegal phone call interception. *AH v. Douglas Cable Communications* 929 F. Supp. 1362, 1388-89 (D. Kan. 1996).

• Theft of company property. *Byle v. Anacomp, Inc.*, 854 F. Supp. 738 (D. Kan. 1994).

In these situations, the employment-at-will doctrine provides no defense. These are tort claims protecting important public policies. The employment-at-will doctrine is no license to fire employees to hide public safety violations or other illegal activity.

3. Federal Employers Liability Act.

In *Hysten v. Burlington Northern Santa Fe Ry. Co., 211* Kan. 551, syl. par. 1, 108 P.3d 437 (2004), the Kansas Supreme Court ruled that Kansas law recognizes an action in tort based on an employer's retaliatory discharge of an employee for exercising of rights under the Federal Employers Liability Act ("FELA"). The Court found that the public policy underlying FELA is identical to the Kansas public policy behind our workmen's compensation laws to justify similar protection under Kansas law and the inadequacies. Also the Court ruled that anti-retaliation remedies under federal law were inadequate, so a state law cause of action is justified.

***23 4. Reporting Elder Abuse.**

This Court recently recognized the strong public policy of protecting the **elderly** from **abuse**. In *Poull v. Affinitas Kansas, Inc.*, No. 102,700, 228 P.3d 441 (Table), 2010 WL 1462763 (Kan. App. Apr. 8, 2010), a call center employee spoke with an **elderly** woman who said her kids were stealing from her and draining her bank accounts. The employee reported this information to a government agency, even though disclosing information about call center customers violated company policy. The employee was terminated for breaching various workplace policies in connection with the report and for her performance generally.

The employee sued and asserted, among other things, a retaliatory discharge claim based upon Kansas public policy encouraging people to report suspected **abuse**, neglect, or exploitation. 2010 WL 1462763, *5. Plaintiff brought this claim apparently in addition to a statutory cause of action available to any person terminated "solely for the reason that [the] employee made" a report of **elder abuse**. *Id. (citing* K.S.A. 2009 Supp. 39-1432(b)). The district court entered summary judgment against the employee's claim because her reports of **elder abuse** were not the sole cause for termination.

On appeal, this Court noted the employee did not present a whistleblowing claim because it did not involve infractions of law by a coworker or the employer. 2010 WL 1462763, *4. Nevertheless, the Court concluded that public policy supports a tort claim when an employer terminates an employee in retaliation for the good-faith reporting of **elder abuse**. *Id.*, *6. This Court cited K.S.A. 2009 Supp. 39-1402, -1403, -1431, and - 1432 to arrive at this conclusion, statutes created in the 1980's and supplemented over the years. This Court ruled, however, that the legislature had already spoken as to the proof needed - that the **elder abuse** complaint be the sole reason for termination. *Id., *1 (citing* ***24** K.S.A. 2009 Supp. 39-1432(b)). Thus, this Court affirmed summary judgment because the employee could not show her report was the sole cause of her termination.

5. Unemployment Claims.

K.S.A. 44-615 prohibits employers from discriminating against employees because of such employee's testimony or anticipated testimony in an unemployment proceeding. In *Kistler v. Life Care Centers of America, Inc., 620* F. Supp. 1268, 1269-70 (D. Kan. 1985), the Court ruled that this statute provided the public policy to support a retaliatory discharge tort claim under *Murphy*. 620 F. Supp. at 1269-70.

E. *Murphy* And Its Progeny Charge Kansas Courts With The Duty To Determine Whether An Employee's Termination Violates Public Policy.

The examples above are by no means an exhaustive list of policies that will support a retaliatory discharge claim. The Kansas Supreme Court listed several other examples in a 1991 opinion:

> Conduct of an employer violative of public policy and giving rise to a cause of action has been recognized when an employee is discharged in retaliation for opposing an illegal or unethical activity of the employer, in retaliation for filing workers compensation claims, in retaliation for exercising rights under labor-management relations statutes, as a penalty for refusing to take a polygraph exam, as a penalty for taking time to serve on jury duty, and for various other violations of public policy interests.

Brown v. United Methodist Homes For The Aged, 249 Kan. 124, 135, 815 P.2d 72 (1991) (citations omitted). Kansas courts have therefore been open to recognizing new policies as being important enough and well established enough to support a retaliatory discharge claim.

Although retaliatory discharge was a novel theory in 1981 when this Court issued the *Murphy* decision, the tort is so well recognized now that Kansas has a pattern jury instruction for it. P.I.K. Civ. 4' § 124.56. The notes to that Instruction state that Kansas ***25** courts are charged with the obligation to "determine first as a matter of law whether a public policy prohibits the actions alleged by plaintiff and, if found, instruct the jury that if they find that the facts support the plaintiff's theory of retaliation, such action is prohibited by said policy and plaintiff may recover." PIK Civ. 4th § 124.56, notes on use. This process requires the court to identify a specific public policy, evaluate whether it is "so thoroughly established" and "so definite and fixed" that "its existence is not subject to any substantial doubt." *Palmer,* 242 Kan. at 897.

There is no pre-established limit on the number of public policies that can support a retaliatory discharge claim. As the long line of cases discussed above demonstrate, each proposed public policy must be evaluated based on statutes and court decisions. If

the policy is well established and definite, then the court must decide whether it is important enough to support a retaliation claim.

With these ideas in mind, we move to the central issue: whether the public policy underlying the KWPA supports a retaliatory discharge claim.

F. Kansas' "Strong And Longtime" Public Policy Of Protecting Wages And Wage Earners Supports A Retaliatory Discharge Claim.

The court below declined to be the first to declare that Kansas' public policy of protecting wage earners supports an exception to the employment-at-will doctrine. It said the "policy arising out of the KWPA is not so defined and fixed as required by Kansas law to serve as an exemption to the employment-at-will doctrine." (R. Vol. I, 289).

This ruling is erroneous. Both Kansas and federal law reflect an historic public policy protecting wages and wage earners. Below is a list of some illustrative examples:
• Otherwise exempt personal property is subject to garnishment for collection of unpaid wages. K.S.A. 60-2307;

***26** • Wage garnishments are limited and regulated by K.S.A. 60-2310;

• There is a preference for payment of employee's wages in insolvency. K.S.A. 44-312;

• Personal liability for employee's wages exists under the KWPA, the Kansas Minimum Wage and Maximum Hours Law (K.S.A. 44-1202(d)), and the federal Fair Labor Standards Act (29 U.S.C. § 203(d)); and

• Wages have priority in bankruptcy. *See* 11 U.S.C. § 507(a)(4).

The Kansas Supreme Court has recognized this public policy protecting wages and wage earners. In *Burriss v. Northern Assurance Co. of America*, 236 Kan. 326, 691 P.2d 10 (1984), the plaintiff's husband died in an automobile collision. The decedent was retired at the time of his death, receiving pension and Social Security but no "monthly earnings" to justify survivors' benefits under the PIP statute. Plaintiff challenged the constitutionality of conditioning the availability of PIP survivors' benefits on whether the decedent was a wage earner or a pensioner. The Court applied a "reasonable basis" test and ruled the legislature justly crafted PIP benefits to protect wage earners in accordance with our state's longtime public policy:

> Is there a reasonable basis for the distinction between wage earners and nonwage earners? Throughout the history of this state, the protection of wages and wage earners has been a principal objective of many of our laws. See, for example, K.S.A. 60-2307, originally enacted as G.S. 1868, ch. 38, § 6, providing that otherwise exempt personal property shall not be exempt from attachment or execution for wages; K.S.A. 44-312, enacted in 1901, giving preference to the payment of wages in the case of receiverships or assignments for the benefit of creditors; the statute restricting garnishment of wages, K.S.A. 60-2310, which reflects the rationale of G.S. 1868, ch. 80, § 490; and the wage payment act, K.S.A. 44-313 et seq., enacted in 1973. K.S.A. 40-3103, like the statutes mentioned above, gives preference to wage earners, in order that they and the families dependent upon them are not destitute.

***27** 236 Kan. at 333. The Court ruled the legislature's decision to protect wage earners and their families, to the exclusion of others, was constitutional.

The KWPA was designed as another method of furthering this long-held public policy. To this end, the KWPA provides, as its overarching principal, that employers must timely "pay all wages due", and that employers may not "withhold, deduct, or divert any portion of an employee's wages" except for limited, approved reasons. K.S.A. 44-314(a), 44-319(a). It further provides a penalty of 1% per day for late payment. K.S.A. 44-315(b).

Kansas appellate courts have recently had two occasions to address the policies underlying the KWPA. In 2005, this Court decided: *A.O. Smith Corp. v. Kansas Dep't of Human Resources*, 36 Kan. App. 2d 530, 144 P.3d 760 (2005). This Court had to determine whether employees involved in a plant divestiture were "terminated" when they stopped working for the old employer and started working for the new employer. This was important because of the KWPA consequences regarding vacation pay accrued with the old employer. The old employer argued that the employees retained identical jobs and benefits following the divestiture so they were not "terminated" upon stopping working for the older employer. This Court disagreed, stating "[t]his construction would not be consistent with the purpose of the KWPA, which was to protect low-income workers from the **abuses** of employers." 36 Kan. App. 2d 538-39 *(citing, inter alia*, 1973 Senate Committee on Public Health and Welfare Hearing on H.B. 1429). The Court went on to rule the employees were in fact terminated in the divestiture, and that the employees were entitled to unpaid wages and penalties.

In 2007, the Supreme Court emphasized the policies underlying the KWPA in a case by an undocumented worker. In ***28** *Coma Corp. v. Kansas Dep't of Labor*, 283 Kan. 625, 154 P.3d 1080 (2007), an undocumented worker prevailed in a KWPA administrative action, but on appeal the district court ruled the KWPA did not apply to undocumented workers and therefore reversed. On appeal, the Supreme Court ruled the undocumented worker could maintain a KWPA claim.

The Supreme Court confirmed in *Coma Corp*. that there is a "strong and longtime Kansas public policy of protecting wages and wage earners." 283 Kan. at 644. To support this statement, the Court harkened to *Burriss'* observation that "the protection of wages and wage earners has been a principal objective of many of our laws," including the KWPA. *Id. (quoting Burriss*, 236 Kan. at 333). The Court said KDOL reinforced this strong public policy with KAR 49-21-2(b)(6), a regulation that nullifies contracts violative of the KWPA. 283 Kan. at 645.

Waddell & Reed asked the district court to let higher courts resolve the core legal issue whether the public policy underlying the KWPA supports an exception to the employment-at-will doctrine. (R. Vol. I, 220). The district court agreed, stating that if such an exception exists for the KWPA, "it is the function of the appellate courts to find it." (R. Vol. 1, 291).

Now the issue is before a higher court. The policy of protecting wages and wage earners is protected by numerous statutes. This Court recognized the strength of this public policy in *A.O. Smith*, and the Kansas Supreme Court has done so in at least two cases: *Burris* and *Coma Corp*. Deeds asks this Court to declare that the fixed, well-established public policy of protecting wages and wage earners, *dating back to 1868*, and which is a principal objective of the KWPA, protects employees from retaliation when they exercise rights under the KWPA.

***29** The public policy underlying the KWPA is similar to the public policy underlying the workmen's compensation laws. *Compare Murphy*, 6 Kan. App. 2d at 495-96 *with Coma*, 283 Kan. at 644-45. The legislative history of the KWPA reflects a desire to keep employers from "withhold[ing] wages earned" or "manipulate[ing] employees through misleading statements of the offered terms of employment." *Proving for Wage Payment and Collection: Hearing on H.B. 1429 before the House Comm. on Labor and Industry*, 1973 Leg., 68th Sess. (Kan. 1973). Workers and their families depend on the timely payment of wages. Protecting wages is a very important public policy. These considerations are similar to those involved in *Murphy* and the Workers Compensation Act, which is designed to provide continued income to employees injured on the job.

The court below was persuaded that our legislature and courts' silence on whether the KWPA could support a retaliatory discharge claim is significant. (R. Vol. I, 288-89). But the Workers Compensation Act was silent too, and this Court did not let that prevent recognition of the claim for retaliation in *Murphy*. 6 Kan. App. 2d at 496-97. That silence is also outweighed by the strong public policy set forth above. *See id*. The *courts'* silence is a separate topic. Again *Murphy* is instructive. The

defendants there argued only a "small band of renegade opinions" permitted workers compensation retaliation claims. This Court responded:

The Supreme Court of Indiana, in *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973), supplied the first judicial recognition that discharge of an employee in retaliation for filing a workmen's compensation claim is actionable at law and may support an award of both actual and punitive damages. Commenting on the case, Vol. 2A Larson's Workmen's Compensation Law, s 68.36, p. 68 (1980 Supp.), states:

"It is odd that such a decision was so long in coming. Perhaps the explanation may lie in the fact that the conduct involved is so contemptible that a (sic) few modern employers would be willing to risk the opprobrium of being found in such a posture."

***30** We would add that such instances may also be rare because employers have simply assumed such conduct was either illegal, actionable or both.

Murphy, 6 Kan. App. 2d at 495. By now, very few employers would think they can take an employee's wages, and then fire the employee for making formal complaint about it. Waddell & Reed is in the same "opprobrious posture" as the *Murphy* defendants, and the lack of case law addressing that posture is likewise unavailing. The state's public policy - and not the absence of case law chastising the wrongful conduct - is controlling. *See Murphy*, 6 Kan. App. 2d at 495-96.

The KWPA promotes the strong public policy of protecting wages and wage earners. Employees must be free to exercise the rights of the KWPA. As this Court put it in *Murphy:* "To allow employers to coerce employees in the free exercise of their rights under the Act would substantially subvert the purpose of the Act." 6 Kan. App. 2d at 496 (discussing Workers Compensation Act). The same reasoning applies to the KWPA. Employers, therefore, cannot be allowed to retaliate against an employee for exercising those rights. This Court, therefore, should find that the policies underlying the KWPA support a retaliatory discharge claim.

G. Deeds Has Stated And Supported The Retaliation Claim.

Deeds has strong evidence of KWPA retaliation. Waddell & Reed conceded for purposes of summary judgment that Deeds was terminated "at least in part" based on his complaints about retroactive pay cuts. (R. Vol. I, 220-21). Deeds' complaints about the retroactive pay cut clearly implicated his right to wages under the KWPA. "Wages" is a broad term that expressly includes commissions. K.S.A. 44-313(c).

Moreover, contrary to Waddell & Reed's position, an employee may exercise a right protected by statute without expressly invoking or even knowing about the statute. ***31** *See Pilcher v. Bd. of Cmm'rs, Wyandotte County*, 14 Kan. App. 2d 206, 215-16, 787 P.2d 1204 (1990) (potential liability for workers' compensation retaliation arises at the moment the employee is injured, not when he files a claim or otherwise invokes the statute's protection). Indeed, an employee need not have taken any steps toward asserting the claim. *Chrisman v. Philips Industries, Inc.*, 242 Kan. 772, 751 P.2d 140 (1988) (workers compensation) and *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988) (workers compensation). Cases from other states confirm that an employee can exercise a right protected by the state wage payment statute without even knowing about the statute. *See Hoyt v. Target Stores*, 981 P.2d 188 (Colo. Ct. App. 1998); *Cockels v. Int'l Business Expos., Inc.*, 406 N.W.2d 465 (Mich. App. 1987).

Furthermore, Deeds' complaints about the retroactive pay cut are protected whether or not he was correct about the legality of the cut. Consider the employment discrimination context, where it is well established that an employee need not prevail on the underlying discrimination claim to prevail on the retaliation claim. *See McCabe v. Johnson County, Bd. of County Com'rs*, 5 Kan. App. 2d 232, 239, 615 P.2d 780 (1980) ("[T]he absence of probable cause to support [a plaintiff's] allegation of sexual discrimination in compensation does not control disposition of the retaliation charge...."). In the same vein, the *Murphy* line of cases does not address whether the employees had meritorious workers compensation claims. That is because our Courts protect from interference the *right* to pursue claims, the same protection that Deeds seeks here.

The district court thus erred by relying on the adverse ruling from the KDOL Action. (R. Vol. I, 292, 296, 300). The KDOL decision is on appeal and thus has no weight. *See* K.S.A. 44-322a(b), 77-527 Further, even if Deeds were to lose his KWPA claim, his retaliation claim has merit. He was fired for asserting his right to be paid the ***32** commissions he reasonably believed were owed. That is illegal retaliation for asserting rights protected by the KWPA. This Court should reverse and remand for a trial Deeds' retaliatory discharge claim.

II. The District Court Erred By Entering Summary Judgment Against Deeds' Wrongful Discharge Claim.

Waddell & Reed has given different and inconsistent reasons for firing Deeds. Deeds contends Waddell & Reed wrongfully fired him to keep commissions on accounts he had already procured. The District Court found that Deeds presented sufficient evidence to raise a just question on this point, but refused to recognize such a wrongful discharge claim. (R. Vol. I, 293-94). Courts in other jurisdictions have seen the need to recognize such a claim. This Court should do the same and therefore reverse and remand.

A. Standard Of Review.

Deeds incorporates the standard of review set forth in Sec. I, A, above. Because the district court dismissed Deeds' wrongful discharge claim on the basis that it is not recognized under Kansas law, this Court's review is unlimited.

B. Reference To Where Issue Was Raised And Ruled Upon.

The district court found that the motivating factors leading to Deeds' termination are disputed issues of fact. (R. Vol. I, 294). However, it ruled against Deeds because it “has doubts that the public policy of the KWPA exhibits the same weight and universal acceptance as the public policies previously accepted by the appellate courts as foundations for exceptions to the employment-at-will doctrine.” (R. Vol. I, 294). Waddell & Reed's arguments on this point are at R. Vol. II, 326-328 and R. Vol. I, 224-226. Deeds' arguments are at R. Vol I, 76-78.

***33 C. Discharging An Employee For The Purpose Of Keeping Otherwise Earned Commissions Violates The Public Policy Of The State Of Kansas.**

As previously explained, there is a strong and longtime policy of protecting wages and wage earners. (Sec. I, F, above). If employers are permitted to fire employees who have completed all or substantially all of the work necessary to earn a commission for the purpose of avoiding paying that commission altogether, or worse yet, to enable supervisors to terminate employees to appropriate commissions for themselves, then employers are free to subvert the purposes of the KWPA. That cannot be the law. This Court should recognize a claim for wrongful discharge based upon the foregoing situation.

Courts in other jurisdictions have recognized a claim for wrongful discharge in circumstances like the present. In *Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137 (Cal. Ct. App. 2d Dist. 1995), the employee sued his former employer under a wrongful discharge theory, alleging the employer fired him to avoid paying accrued commissions and vacation pay. The employer, like Waddell & Reed, argued the public policies underlying the state wage payment law do not support a wrongful discharge claim, and prevailed on a demurrer. On appeal, the California Court of Appeals determined that the Labor Code requires prompt payment of wages, that those statutes *were* designed to serve society's interests through a more stable job market, and that criminal liability could attach for failure to pay wages due. 31 Cal. App. 4th at 1137, 1147 (citations omitted). Reversing the trial court, the appellate court held: if an employer discharges an employee in order to avoid paying him the commissions, vacation pay, and other amounts he has earned, it violated a fundamental state policy. *Id*. at 1148.

***34** Another court held, under Maryland law, that an employer's termination of certain loan officers was pretextual, because, by firing the loan officers, the managers increased their commissions. *Rogers v. Savings First Mort., LLC*, 362 F. Supp. 2d 624, 643-46 (D. Md. 2005).

These cases make sense. An employer is not entitled to fire an employee to try to avoid paying commissions for sales work already performed. Deeds prays this Court reverse and remand the wrongful discharge claim for trial.

D. Deeds' Presented Evidence Sufficient To Prove Wrongful Discharge.

Deeds presented evidence that he was terminated to appropriate his commissions:
• Newton told Deeds he was being fired for complaining about his trail commissions. (R. Vol. I, 57, 117). Newton then revised his story and said there were additional reasons, including poor performance. (R. Vol. I, 66).

• Newton's statements about Deeds' poor performance were pretextual. (R. Vol. I, 66-67). Indeed, Waddell & Reed concedes for summary judgment purposes that there is a genuine issue regarding the legitimacy of its stated reason for Deeds' termination. (R. Vol. I, 220, fn. 9).

• Newton believed that after Deeds was gone, he was the only salesperson who could handle the lucrative Pictet account. (R. Vol. I, 68).

• Newton signed and affidavit denying he knew who would get the Pictet account, contrary to his deposition testimony that he participated in the decision to assign the Pictet account to himself after Deeds' termination. (R. Vol. I, 57-59).

• After firing Deeds, Waddell & Reed retained a windfall of unpaid commission scheduled to be paid to Deeds. (R. Vol. I, 69, 148).

***35** • After firing Deeds, Waddell & Reed took the position that he was not entitled to the disputed fourth year and trail commissions, under any circumstances, because he was no longer an employee.

Construed in a light favorable to Deeds, these facts compel the conclusion that Deeds is entitled to a trial on his wrongful discharge claim.

Additionally, the wrongful discharge claim should be reversed and remanded because the district court erroneously relied on the KDOL hearing officer's conclusion that continued client servicing (i.e., continued employment) was a condition precedent to Deeds' continued receipt of trail commissions. (R. Vol. I, 292, 296, 300). The KDOL preliminary initial order carries no weight. *See* K.S.A. 44-322a(b), 77-527'. Further, Deeds' termination was wrongful regardless of the outcome of the KDOL Action.

Waddell & Reed touts the fact that Deeds has stated he personally did not believe Newton terminated his employment so that he could appropriate Deeds' commissions for himself. (R. Vol. II, 318; R. Vol. I, 62 (uncontroverted)). But an employee's subjective beliefs about the employer's intent simply do not matter in illegal discharge cases. *See, e.g.*, *Lewis v. Standard Motor Products, Inc.*, 203 F Sup. 2nd 1228, 1234 (D. Kan. 2002).

Deeds prays this Court reverse and remand the wrongful discharge claim for trial.

III. The District Court Erred In Ruling That An At-Will Employee Cannot State A Claim For Prevention Unless The Employer's Conduct Constitutes Retaliatory Discharge Or Wrongful Discharge.

Deeds' prevention claim is fundamentally different from the two claims just discussed. Whereas the retaliatory discharge and wrongful discharge claims challenge the legality of the termination, the prevention claim goes to the compensation Waddell & Reed owes Deeds based upon his work prior to the termination.

***36** Waddell & Reed's compensation schedule was structured in such a way that, although Deeds performed the work up front by procuring new investment accounts, his compensation was spread out in the form of annual trail commissions. Waddell & Reed claim that continued servicing of the accounts, and hence continued employment, were prerequisites to Deeds receiving the annual trail commissions. (R. Vol. II, 314). Deeds refutes these claims and asserts that his employment contract provided for him to receive the yearly trail commissions solely for the work involved in procuring the accounts and that he would receive commissions as long as the account remained with Waddell & Reed. (R. Vol. I, 52-53, 63). The court below ruled Deeds established a dispute of fact whether he was required to remain with Waddell & Reed in order to earn the ongoing trail commissions. (R. Vol. I, 282, 284).

Although Deeds specifically contends otherwise, a court or the KDOL could side with Waddell & Reed and conclude that the nominal work involved in servicing the accounts, as well as continued employment, were conditions precedent to his entitlement to the yearly trail commissions. There is also evidence that Waddell & Reed fired Deeds for the specific purpose of appropriating the large amounts of commissions that Deeds had earned, save for the nominal formalities. For this reason, Deeds brought a claim based upon the doctrine of prevention.

A. Standard Of Review.

Deeds incorporates the standard of review set forth in Sec. I, A, above. Because the district court dismissed Deeds' prevention claim holding that it is not recognized under Kansas law, this Court's review is unlimited.

***37 B. Reference to Where Issue Was Raised And Ruled Upon.**

The district court denied Deeds' prevention claim because he could not prove an independently tortious firing: "[s]ince a finding that the termination is unjustified appears to be a condition precedent to a claim for prevention, this Court's rulings against plaintiff on his retaliatory discharge and/or wrongful discharge claim appears to be fatal to plaintiffs prevention claim." (R. Vol. I, 298). Waddell & Reed's arguments on this point are at R. Vol. II, 328-329 and R. Vol. I, 226. Deeds' arguments are at **R.** Vol. **I,** 78-**81.**

C. Elements Of A Prevention Claim.

The doctrine of prevention provides that a party to a contract cannot derive any benefit or escape any liability from his own failure to cause or failure to seek the happening of a condition precedent. *Morton Buildings, Inc. v. Dep't of Human Res.*, 10 Kan. App. 2d 197, 201, 695 P.2d 450 (1985) (*citing Wallerius v. Hare*, 194 Kan. 408, 399 P.2d 543 (1965)). A condition precedent is something that must happen or be performed before a right can accrue to enforce the main contract. 10 Kan. App. 2d at 200. A party who fails to satisfy a condition precedent may avoid the consequences of his failure if it is caused by the conduct of the other party to the agreement. *Id*. The burden to prove its application is on the party seeking to take advantage of the doctrine. *Id. (citing Jensen v. Jensen*, 205 Kan. 465, 467, 470 P.2d 829 (1970)). In addition, the conduct alleged to have thwarted performance of the condition must in some way be unjustified. *Id*. Thus, "the party who has demanded the condition precedent cannot hinder, delay or prevent its happening *for the purpose of avoiding performance of the contract." Id*. (emphasis in original; *quoting Wallerius*, 194 Kan. at 412).

***38 D. Whether It Is Called "Bad Faith" Or "Unjustified," Firing An Employee To Avoid Payment of Commissions Supports A Prevention Claim.**

This Court has indicated that, in certain instances, an at-will employee may recover unpaid compensation under the doctrine of prevention. In *Morton Buildings, Inc. v. Dep't of Human Res.*, 10 Kan. App. 2d 197, 695 P.2d 450 (1985), the employer fired two employees and refused to pay them distributions from its profit-sharing plan because they were not employed on the distribution date, as expressly required by the plan. The employees argued that the employer waived the condition precedent (employment on the distribution date) by firing them. This Court rejected the employees' argument because "the claimants were both at-will employees" and "[i]n addition, the parties agree that there was no evidence that when it fired them in January, Morton acted in bad faith or for the purpose of depriving them of the profit sharing." 10 Kan. App. 2d at 202. That ruling implicitly acknowledges an at-will employee can state a prevention claim if the firing was in bad faith or was specifically done for the purpose of depriving him of something to which he was otherwise entitled.

1. The At-Will Doctrine Concerns The Duration Of The Employment Relationship And Does Not Allow An Employer To Steal Commissions Otherwise Earned.

In the absence of a contract, express or implied, between an employee and his employer covering the duration of employment, the employment is terminable at the will of either party, and the employee states no cause of action for breach of contract by alleging that he has been discharged. *Johnson v. National Beef Packing Co.*, 220 Kan. 52, syl. par. 1, 551 P.2d 779 (1976); *see also Morriss v. Coleman Co., Inc.*, 241 Kan. 501, 510, 738 P.2d 841 (1987). The employment at-will doctrine is said to be reinforced by the principle of mutuality of obligations. *Morriss*, 241 Kan. at 510. If the employee is ***39** free to quit at any time, then the employer must be free to dismiss at any time. *Id*. This doctrine has been limited by courts everywhere to prevent violations of important public policies. *See id.*, 241 Kan. at 509. By its very definition and its own rationale, employment-at-will goes to the duration of employment.

The District Court erroneously applied the employment-at-will doctrine, which concerns *duration* of employment, to a dispute about deferred *compensation*. (R. Vol. I, 298). As explained below, an employer cannot invoke employment-at-will to steal commissions that were spread out over time, on the basis that the employee failed to remain employed with the employer and perform ministerial tasks associated with the account.

2. Courts In Other Jurisdictions Have Held An Employer May Not Avoid Paying Commissions Otherwise Earned Just By Termination For That Purpose.

Courts in other jurisdictions have held that an employer may not avoid paying commissions that have otherwise been earned by terminating the employee for the purpose of keeping the commissions. In *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109 (2nd Cir. 1985), the court, applying New York law, found that, although New York does not impose an implied covenant of good faith in the termination of at-will employment contracts, good faith must still be exercised in the performance of employee compensation arrangements. *Id*. Wakefield was a salesman for NTI before his termination. As with Deeds, his compensation was in large part based upon commissions. NTI fired Wakefield shortly before it finalized large sales agreements that Wakefield had spent considerable time procuring. NTI asserted that employees were only entitled to commissions if they were still employees on the date the "incentive compensation" became due. NTI then refused to pay Wakefield any commissions on ***40** these sales. Wakefield sued NTI asserting that NTI had breached its contract to pay him commissions by dismissing him after he had performed services that assured the sales. 769 F.2d at 110.

Wakefield argued that the requirement that he be employed when the sales were finalized was waived because NTI fired him "precisely to avoid paying him commissions on sales that were completed but for formalities." *Id*. at 112. NTI responded by asserting that Wakefield was "an at-will employee, terminable for any reason at any time." *Id*. NTI further noted that New York courts have "squarely held that the implied covenant of good faith does not give rise to a contract action for the wrongful

discharge of an at-will employee under New York law . . . since the contrary result would be wholly inconsistent with the very nature of the contract." *Id*. (citations omitted).

The Second Circuit explained that, although the lack of an implied covenant of good faith and fair dealing in at-will employment contracts would preclude Wakefield from recovering for his termination *per se*, "obligations derived from the covenant of good faith implicit in the commission contract may survive the termination of the employment relationship." *Id. at* 112. The court reasoned:

> Implied contractual obligations may coexist with express provisions which seemingly negate them where common expectations or the relationship of the parties as structured by the contract so dictate, [citations omitted], A covenant of good faith should not be implied as a modification of an employer's right to terminate an at-will employee because even a whimsical termination does not deprive the employee of benefits expected in return for the employee's performance. This is so because performance and the distribution of benefits occur simultaneously, and neither party is left high and dry by the termination. Where, however, a covenant of good faith is necessary to enable one party to receive the benefits promised for performance, it is implied by the law as necessary to effectuate the intent of the parties.

Id.

***41** The Second Circuit further reasoned that allowing an employer to fire an at-will employee for the purpose of avoiding paying commissions that otherwise would be owed would be inconsistent with the employment contract's purpose and the parties' expectations. "Such an interpretation would make the performance by one party the cause of the other party's non-performance.... In such circumstances, an unfettered right to avoid payment of earned commissions in the principal or employer creates incentives counterproductive to the purpose of the contract itself, in that the better the performance by the employee, the greater the temptation to terminate." *Id*. at 112-13.

Other courts have followed reasoning similar to *Wakefield*. In *Stiglich v. Jani-King of California, Inc*., No. D051811, 2008 WL 4712862 (Cal. App. 4 Dist., Oct. 28, 2008), the employee's commissions were largely based upon procuring sales, but were also conditioned upon post-sale servicing obligations. The employee claimed that his termination prevented him from fulfilling those post-sale servicing obligations, so his performance was excused. The court agreed, rejecting the argument that this result was contrary to the nature of employment-at-will:

> An at-will employment may be ended by either party at any time without cause, for any or no reason, and subject to no procedure except the statutory requirement of notice. Our conclusions that Jani-King's termination of Stiglich's at-will employment prevented him from performing his post-procurement contractual duties, and thus that the court did not err in awarding him commissions on the accounts he had procured, does not nullify or in any manner affect the statutory at-will employment presumption. The presumption still exists, and an at-will employment may still be ended by either party at any time without cause, for any or no reason, subject to the statutory notice requirement. However, when an at-will sales employee has earned a commission or a portion of a commission by procuring a contract prior to the termination of his or her employment, but is prevented from performing post-procurement duties specified in the employment agreement as a result of that termination, the employee's performance of the post-procurement duties is deemed excused, and the prevention of performance is the legal equivalent of such performance.

***42** 2008 WL 4712862 at *8 (internal citations omitted).

Wakefield and *Stiglich* show that employers cannot avoid paying commissions by imposing a condition of continued employment for employees to earn commissions, and then unilaterally terminating the employment to divert those commissions. Other courts agree. *E.g.*, *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1257 (Mass. 1977).

Kansas' status as an employment-at-will state, and the lack of an implied covenant of good faith and fair dealing applicable to termination decisions, cannot be interpreted as a blank check for employers to break compensation agreements where commissions are capped annually and spread out over several years. Any other result would be contrary to Kansas' history of protecting wages and wage earners, and the doctrine of prevention must supply a remedy.

E. Viewed In A Light Most Favorable To Deeds, He Has Successfully Stated And Supported A Prevention Claim.

Deeds' case is very similar to the *Wakefield* and *Stiglich* cases discussed above. He spent well over a year procuring the Pictet account, by far the largest account in Waddell & Reed's institutional investment division. That hard work was rewarded with a nearly immediate termination. Deeds' commission for securing the Pictet account, and other accounts, was to be paid over three years, rather than when the accounts were procured. Waddell & Reed terminated Deeds and then "point[ed] out that in order to be eligible for commissions, one must be an employee." (R. Vol. II, 485). Waddell & Reed retained a windfall of unpaid commissions scheduled to be paid, but never paid, to Deeds. (R. Vol. I, 69, 148). Even Waddell & Reed concedes for summary judgment purposes that there is evidence that its stated reason for termination--poor performance--is pretextual. (R. Vol. I, 220, fn. 9).

***43** If the Court agrees with Waddell & Reed and decides that continued employment and account servicing were conditions precedent to receipt of commissions, Deeds' failure to meet those conditions precedent was waived by Waddell & Reed's bad faith and unjustifiable conduct of deferring his compensation over time and then firing him specifically to avoid payment.

Finally, the prevention claim should be reversed and remanded because the district court erroneously relied on the KDOL hearing officer's conclusion that continued client servicing (i.e., continued employment) was a condition precedent to Deeds' continued receipt of trail commissions. (R. Vol. I, 292, 296, 300). The KDOL's initial is on appeal and carries no weight. *See* K.S.A. 44-322a(b), 77-527'. Further, as explained above, finding the presence of such a condition precedent has no bearing on the prevention claim because Waddell & Reed prevented Deeds from performing the condition and therefore waived it.

IV. The District Court Erred In Granting Summary Judgment To Waddell & Reed On Deeds' Quantum Meruit Claim.

Deeds brought a claim of quantum meruit against Waddell & Reed. That claim is in the alternative to the prevention claim and the KWPA Action. Deeds reasonably believed that he would be paid commissions for the life of accounts gained prior to July 1, 2005, and for three full years for accounts gained after July 1, 2005. Waddell & Reed disagrees--claiming it understood the deal to be that all Deeds' trail commissions are time-capped and further, that Deeds could only receive his commissions by maintaining employment with Waddell & Reed.

A jury might find there to have been a contract based on the terms as understood by Deeds. Or it might find a contract based on the terms as understood by Waddell & ***44** Reed. Or, a jury might find the parties failed to reach agreement at all. The quantum meruit claim is intended to apply to this latter possibility. As explained below, in such a situation the court should analyze the parties' understanding of their relationship, value the services provided, and provide a remedy that is equitable to all involved.

A. Standard Of Review.

Deeds incorporates the standard of review set forth in Sec. I, A, supra. Because the district court dismissed Deeds' unjust enrichment claim on the basis that it is not recognized under Kansas law, this Court's review is unlimited.

B. Reference To Where Issue Was Raised And Ruled Upon.

The district court denied Deeds' unjust enrichment claim, like the prevention claim, because there was no independently illegal termination: "[s]ince it is undisputed that plaintiff was an at-will employee, and since this Court has found that plaintiff's termination does not give rise to a claim based upon a recognized exception to the employment-at-will doctrine, and thus, no wrongful conduct on the part of Waddell & Reed in terminating, then it appears that plaintiff's quantum meruit claim must fail." (R. Vol. I, 303). Waddell & Reed's arguments on this point are at R. Vol. II, 329-330 and R. Vol. I, 227-228. Deeds' arguments are at R. Vol. I, 81-82.

C. Elements Of A Quantum Meruit Claim Of Unjust Enrichment.

Quantum meruit is a "modern designation for the older doctrine of quasi-contracts." *Haz-Mat Response, Inc. v. Certified Waste Services Limited*, 259 Kan. 166, 910 P.2d 839 (1996) (citations omitted). The theory of quasi-contract is raised by the law on the basis of justice and equity regardless of the assent of the parties. *Id*. (citations omitted). The substance of an action for unjust enrichment lies in a promise implied in ***45** law that one will restore to the person entitled thereto that which in equity and good conscience belongs to him. *Id*.

Where the minds of the parties did not meet as to some of the essential terms of a contract, a party thereto who furnishes material or renders services to the other party, relying on the terms as he understood them and thinking there was an express contract, is entitled to recover what the labor furnished was reasonably worth. *Campbell-Leonard Realtors v. El Matador Apartment Co.*, 220 Kan. 659, 662, 556 P.2d 459 (1976). Where parties agree for the performance of certain work, and the work is done and accepted, and it appears that there was a misunderstanding as to the price to be paid for it, the law rejects the understanding of each and awards reasonable compensation. *Id*.

The basic elements of a claim based on unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention by the defendant of the benefit without payment of its value. *Id., citing J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738 (1988).

D. The District Court's Reasoning For Granting Summary Judgment On Deeds' Unjust Enrichment Claim Is Not Supported By Kansas Law.

The district court's assertion that a quantum meruit claim cannot lie absent a "recognized exception to the employment at-will doctrine" or independently "wrongful conduct on the part of Waddell & Reed" is incorrect and not substantiated by Kansas law. The court below did not cite any authority for this legal conclusion.

Waddell & Reed, in its summary judgment motion, cited to *Babcock v. Carrothers Const. Co., LLC*, No. 94,471, 124 P.3d 1084 (Table), 2005 WL 3527117, *3 (Kan. App. Dec. 23, 2005) for the principle that an "unjust enrichment claim is barred ***46** absent wrongful conduct by the defendant." (R. Vol. II, 330). This is a misstatement of the law. *Babcock* and *Haz-Mat* involved parties who had not even attempted to make a contract. Those cases imply that some form of wrongful conduct is required when an unjust enrichment claim is brought by a party not in privity with the defendant. *Id*. at *2. Here Deeds and Waddell & Reed had an employment relationship. They were in privity with each other. They certainly intended to enter into a contractual relationship under which Deeds provided services in exchange for pay.

Courts have not required a finding of wrongful conduct in situations where the contracting parties have ostensibly contracted but failed to agree on an important term. *See Campbell-Leonard Realtors v. El Matador Apartment Co.*, 220 Kan. 659, 556 P.2d 459 (1976) (where the time and method of payment of a commission are not agreed upon and the parties attach a good deal of importance on those terms of their contract, there is no express contract and recovery must be in quantum meruit); *Perry v.*

Al George, Inc., 428 So. 2d 1309 (La. App. 1983) (no agreement about commissions following termination; quantum meruit recovery affirmed). Thus, Deeds need not prove wrongful conduct to set up a quantum meruit claim.

E. Viewed In A Light Most Favorable To Deeds, He Stated And Supported A Quantum Meruit Claim.

The court below found that there was a dispute as to whether Deeds was required to remain with Waddell & Reed in order to receive commissions on accounts that he procured. (R. Vol. I, 282). This finding would support the conclusion by a finder of fact that there was a failure on the part of Deeds and Waddell & Reed to agree on a very material term of the employment relationship. Deeds furnished services relying on the ***47** terms of his compensation contract as he reasonably understood them, which entitles him to reasonable compensation.

Deeds' understanding was that he earned his commission upon gaining a new account and that he would receive commissions as long as the account remained at Waddell & Reed. (R. Vol. I, 63). For pre-July 1, 2005 accounts, this meant that Deeds would receive trail commissions for the life of the account. For accounts gained after July 1, 2005 subject to the July 2005 memorandum, Deeds would receive commissions for three years after gaining a new account. Waddell & Reed claimed that Deeds was only entitled to commissions during the time of his employment and it has refused to pay Deeds' commissions since firing him.

Deeds believed that he would receive his full commissions so long as the account remained with Waddell & Reed. This belief was justified, as Waddell & Reed imposed a $50,000 per-year cap on per-account, annual commissions. (R. Vol. I, 64). Only two of 24 firms in a market study reviewed by Waddell & Reed had caps, and those caps were $250,000 per account per year, not $50,000. *(Id.)*. This heavily deferred compensation structure reasonably demonstrates that the ongoing trail commissions paid for work already performed, and should be paid regardless of employment status. Deeds was to be paid commissions as long as the accounts remained with Waddell & Reed, except with a three year cap that was imposed on accounts gained after July 1, 2005. (R. Vol. I, 63-64, 91 (trans, pg. 88)). Waddell & Reed accepted Deeds' services while aware of his understanding of the compensation agreement and, unless forced to pay Deeds' his post-termination commissions, enjoys an unjust enrichment.

Deeds was the top performing salesman in Waddell & Reed's institutional investment division. Deeds' Pictet account ultimately involved over $2 billion. (R. ***48** Vol. I, 68). It was the largest account Waddell & Reed ever had. (R. Vol. I, 58, 67). Deeds conferred massive benefits upon Waddell & Reed through his work. Justice requires that Waddell & Reed pay Deeds his commissions.

F. Reversal And Remand Is Appropriate On Deeds' Quantum Meruit Claim.

The district court ruled against Deeds's quantum meruit claim, finding it required proof of an independently illegal termination. If this Court finds in Deeds' favor on either of the discharge claims, then the Court should also reverse the ruling on Deeds' quantum meruit claim under the district court's own logic. Even if this Court rules against the discharge claims, this Court should still reverse and remand Deeds' quantum meruit claim under the arguments and authorities just discussed.

Additionally, the unjust enrichment claim should be reversed and remanded because the district court erroneously relied on the KDOL hearing officer's conclusion that continued client servicing (i.e., continued employment) was a condition precedent to Deeds' continued receipt of trail commissions. (R. Vol. I, 292, 296, 300). The KDOL's initial order is on appeal and carries no weight. *See* K.S.A. 44-322a(b), 77-527. Further, such a condition precedent has no bearing on the unjust enrichment claim--Deeds provided valuable services and should be fairly compensated.

CONCLUSION

Plaintiff-Appellant Charles P. Deeds prays this Court reverse the district court's memorandum decision dated August 2, 2010 and remand for trial all of Deeds' claims against Defendant-Appellee Waddell & Reed Investment Management Company.

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